

CANADA / JUDGMENT

Sove v. Froment

2022 BCSC 735

COURT

Supreme Court of British Columbia

DECIDED

2 May 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 735 Sove v. Froment

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sove v. Froment,

2022 BCSC 735

Date: 20220502

Docket: M230376

Registry: New Westminster

Between:

Roger Sove

Plaintiff

And

Harvey Joseph Froment, Cass Powers and Michael Droux

Defendants

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Plaintiff:

C. Carta

Counsel for the Defendants:

D. Merchant

J. Holstein

Place and Date of Trial/Hearing:

Port Coquitlam, B.C.

April 25-29, 2022

Place and Date of Judgment:

Port Coquitlam, B.C.

May 2, 2022

Table of Contents

The Background. 3

The Application and the Applicable Rules/Law.. 3

Rule 11-7(6)(a) - Due Diligence. 6

Rule 11-7(6)(b) - Prejudice. 8

Rule 11-7(6)(c) - Interests of Justice. 9

The Background

- [1] On April 28, 2022, at 6:14 p.m. the defendants' counsel sent an email to plaintiff's counsel attaching what was said to be a second supplementary report of Carolyn Kirkwood. Ms. Kirkwood is a toxicologist whom the defendants intend to call as a part of the defence case in this trial involving a collision and claims for damage for injuries suffered by Roger Sove.
- [2] Liability is denied and Mr. Sove's alcohol consumption before, and sobriety at the time of the accident has been a disputed issue from the outset. It is an issue I will be asked to consider in determining this case.
- [3] In error, the second supplementary report was not attached to the 6:14 p.m. email. Counsel for Mr. Sove received it at 9:32 p.m., well after the close of business on April 28.
- [4] April 28 was the fourth day of this scheduled seven-day trial. By the end of the day, Mr. Sove had all but closed his case. He had testified and called: Bronwynne and Braelynne Sove, his twin daughters; Peter Rondpre, Braelynne's partner; Nizar Shajani, a rebuttal expert toxicologist; and Dr. Angus McDonald, Mr. Sove's family physician who was qualified as an expert.
- [5] Mr. Sove's last witness was his wife, Kathy Sove. She began her evidence shortly after 2:00 p.m. on April 28. She had almost concluded her evidence by the end of the day. On April 29, she returned to complete her direct evidence, and to answer two questions in cross-examination, all of which took about 15 minutes. Mr. Sove closed his case.

The Application and the Applicable Rules/Law

- [6] The defendants then sought leave to introduce Ms. Kirkwood's second supplementary report. The plaintiff objected. Although the defendants did not specifically refer to Supreme Court Civil Rules, R. 11-6(6) in their submissions, it is the applicable rule.
- [7] As this Court has made clear in a number of decisions, the rules with respect to the delivery and mandatory content of experts reports are intended to ensure that all expert reports are tendered in a timely way so that no party is ambushed or surprised at trial. Disputes over late-filed reports are to be avoided.
- [8] The timing of the already served and filed expert toxicology reports, in this case, is relevant to considering the admissibility of the second supplementary report.
- [9] The defendants served Ms. Kirkwood's initial report, dated December 16, 2021, on December 23, 2021. In it, she relied on Mr. Sove's discovery evidence that he arrived at the Artful Dodger Pub ("Pub") at approximately 12:30 p.m. on the date of the collision.
- [10] The plaintiff served Nizar Shajani's responsive report on February 17, 2021. It set out the assumptions on which it was based including that the plaintiff weighed 167 lbs on the date of the collision, that he consumed two sleeves of beer between 1:42 and 2:18 p.m., and that the size of the beer he consumed was either 341 ml (12 oz) or 500 ml (16 oz).
- [11] The defendants then served Ms. Kirkwood's first supplementary report, dated April 4, 2022. In it, she corrected a calculation error that had been commented on by Mr. Shejani. The plaintiff did not object to the admissibility of the first supplementary report.
- [12] As Justice Savage explained in *Perry v. Vargas*, 2012 BCSC 1537, when a member of this Court, Rule 11-6(6), in relation to a party's own expert, is a provision designed to deal with circumstances where an expert's opinion "changes in a material way".
- [13] Rule 11-6(6) provides:
- (6) If, after an expert's report is served under subrule (3)(a) or (4), the expert's opinion changes in a material way and the party who served the report intends to tender that expert's report at trial despite the change,
- (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party, and
- (b) the party must promptly serve that supplementary report on every other party of record.
- [14] The Rule contains an election. A party must decide whether it still seeks to rely on the expert report notwithstanding the material change. If it does, the party must promptly serve a supplementary report. In *Perry* at para. 10, Justice Savage said:

Rule 11-6(6) was not intended to allow experts to add either fresh opinions or bolster reasons upon reviewing for the first time or further reviewing material under the guise of there being a material change in their opinion. To provide otherwise would surely defeat the purpose of the notice provisions contained in Rules 11-6(3) and 11-6(4) and the requirement of R. 11-7(1).

[15] Rule 11-6(7) sets out the mandatory requirements for the content of a supplementary report. It must:

- (a) be identified as a supplementary report,
- (b) be signed by the expert,
- (c) include the certification required under Rule 11-2(2), and
- (d) set out the change in the expert's opinion and the reason for it.

[16] In this case, the second supplementary report is identified as such; it is signed by Ms. Kirkwood, and it includes the certification required under Rule 11-2(2). However, it does not set out a material change in her opinion or the reason for it. It merely purports to provide additional information and opinion. The only facts and assumptions, set out at page 2 of the second supplementary report, are facts and assumptions of which Ms. Kirkwood was aware when she prepared her first report.

[17] The second supplementary report does not set out the instruction letter Ms. Kirkwood received nor does it list every document that she relied on in preparing it. These are mandatory requirements under Rule 11-6(1)(c) and 11-6 (f)(iii) and, as explained by Justice Burnyeat in *Amini v. Khania*, 2014 BCSC 697, must be included in a supplementary report.

[18] Ms. Kirkwood sets out "terms of egagement (sic)". She does not clarify what she means by terms of engagement and whether they form part of the assumptions on which she is now opining.

[19] The second supplementary report does not meet the requirements of the Rules.

[20] However, the analysis does not end here as even if an expert report was not prepared and served in accordance with the Rules, the Court may still permit its admission under Rule 11-7(6) which provides:

At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if

- (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
- (b) the non-compliance is unlikely to cause prejudice
- (i) by reason of an inability to prepare for cross-examination, or

- (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
- (c) the interests of justice require it.

Rule 11-7(6)(a) - Due Diligence

- [21] Rule 11-7(6) focuses on the conduct of the party seeking to tender the report. It requires that party to have exercised due diligence in fact-finding.
- [22] While the defendants submit that the second supplementary report simply contains additional mathematical calculations, I do not agree. It provides two alternate "assumptions" or scenarios based on Mr. Sove's weight at the time of the accident and it contains additional information that Mr. Sove was a "seasoned" drinker. As discussed later, the information about Mr. Sove's weight and history of drinking was available to Ms. Kirkwood when she prepared the initial report.
- [23] To the extent that the second supplementary report contains additional calculations, there is no explanation for why those could not have been included in the initial report.
- [24] In particular, with respect to the parts of the second supplementary report addressing two varying weights for Mr. Sove, this information could have been addressed in the initial report through due diligence.
- [25] As recorded in Ms. Kirkwood's first report, she had access to 56 pages of the Royal Columbian Hospital's ("Hospital") clinical records with respect to the plaintiff. Those records reference Mr. Sove's weight. Mr. Shejani obtained Mr. Sove's weight from the Hospital records. Ms. Kirkwood also had access to Mr. Sove's discovery evidence about his weight. The fact that he may have weighed 167 pounds at the time of the accident, less than the weight Ms. Kirkwood relied on in her initial report, is not new information which could not have been obtained through due diligence.
- [26] For the first time, the second supplementary report provides Ms. Kirkwood's opinion on how much Mr. Sove's blood alcohol concentration would increase for each beer he consumed at his two alternate "assumed" weights. This is information she could have provided in her first report.
- [27] The size of the "sleeves" of beer consumed by Mr. Sove was ascertainable through reasonable due diligence. The defendants had an investigator working on the file who could have determined the size of a sleeve or a simple visit or phone call to the Pub could have obtained that information.

- [28] With respect to the calculations Ms. Kirkwood has now done, based on elimination at the rates of 10 mg% per hour and 20 mg% per hour, those calculations could have been done in the initial report as in paragraph 3 on page 5 she discusses the range of elimination rates but did not do the calculations. Allowing Ms. Kirkwood to now put this evidence before the court is bolstering her initial evidence and should not be permitted.
- [29] Further, information about Mr. Sove's history of alcohol consumption was available in Hospital's records and in Dr. McDonald's clinical records and in the records of the Peach Arch Hospital all of which were disclosed to the defendants in November 2021.
- [30] Ms. Kirkwood has not explained why this supplementary opinion was not addressed in her initial report. It cannot be said that these parts of the second supplementary report arose suddenly despite her or the defendants' due diligence.

Rule 11-7(6)(b) - Prejudice

- [31] Rule 11-7(6)(b) focuses on whether there is prejudice to the plaintiff.
- [32] Delivering an expert report well outside business hours on April 28, after Mr. Sove had all but closed his case.
- [33] It is too late for him to seek a supplementary report from Mr. Shejani.
- [34] Further, in this case, the second supplementary report suggests that Mr. Sove consumed considerably more beer at the Pub on the day of the accident, or that he consumed beer or other alcohol at another time during that day. These suggestions were not put to Mr. Sove in cross-examination, and he will not have an opportunity to refute them. This causes him clear prejudice.
- [35] Finally, Ms. Kirkwood was to be called as the defendants' first witness on April 29. Counsel for Mr. Sove was in the process of preparing to cross-examine her based on her initial and supplementary reports. Mr. Sove's counsel is prejudiced in having to prepare to cross-examine her on the late-delivered second supplementary report.
- [36] While the Court could permit the plaintiff to submit a further report from Mr. Shejani, and/or to recall Mr. Sove and Mr. Shejani, the rules with respect to expert evidence are intended to avoid exactly this situation and the trial disruption and delay it entails.

Rule 11-7(6)(c) - Interests of Justice

- [37] The discretion provided under Rule 11-7(6)(c) should be exercised sparingly, with "appropriate caution" and "in a disciplined way" given the express requirements of Rules 11-6 and 7: Perry at para. 22. As Justice Savage said:

- [22] That is, the "interests of justice" are not a reason to simply excuse or ignore the requirements of the other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the Supreme Court Civil Rules.
- [38] It is not compelling for the defendants to suggest that I would benefit from the additional analysis in Ms. Kirkwood's report and the additional variables it contains. If the information in the second supplementary report is beneficial, it should have been included in her initial report. In my view, it is not in the interests of justice to admit the second supplementary report
- [39] However, I am satisfied that Ms. Kirkwood should be able to testify, solely within the confines of the opinion provided in her initial report, about the effect, if any, on her calculations set out in Table 1 on page 6 of an arrival time of 1:42 p.m. at the Pub.
- [40] I make this determination because it was only during his evidence at trial that Mr. Sove adopted his time of arrival at the Pub as set out in the Google Timeline created by an app on his phone. His evidence at his examination for discovery was that he arrived at about 12:30 or 1:00 p.m.
- [41] The time of Mr. Sove's arrival at the Pub, based on the Google Timeline, was provided to Mr. Shejani. On reviewing the Google Timeline, and accepting it as accurate, Mr. Sove should have, but did not, correct his discovery evidence despite knowing that it had been relied on by Ms. Kirkwood. The Google Timeline was only listed and disclosed to the defendants on April 20, 2022.
- [42] Trial fairness directs that she should be permitted to address the effect, if any, of a later arrival time on her calculations.

"MacNaughton J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/07/2022BCSC0735.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/sove-v-froment-2022>

Prepared on 25 October 2026 · Esheria